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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DAVID PRICE,

Petitioner,

v.

VIKING PENGUIN, INC. and PETER MATTHIESSEN,

Respondents.

WILLIAM STYRON, KURT VONNEGUT, JOHN IRVING, ALFRED KAZIN and SUSAN SONTAG,

Amicus Curiae.

Reply Memorandum

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I.

THE RULINGS OF THE EIGHTH CIRCUIT ARE SIGNIFICANTLY AT ODDS WITH RULINGS OF THIS COURT AND SEVERAL COURTS OF APPEALS—AS RESPONDENTS' COUNSEL HAS RECENTLY AND PUBLICLY ACKNOWLEDGED.

Respondents, in their brief in opposition to plaintiff's Petition for a Writ of Certiorari, describe the decision of the Court of Appeals for the Eighth Circuit as follows:

> This case does not involve questions of first impression, but rather the application of well-established First Amendment principles concerning the protection of political speech and expression of opinions on disclosed facts. Nor is there any split or conflict among the circuit courts of appeals concerning the applicable standard of review or the substantive principles for determining when and whether a statement concerning the conduct of government and its officials is actionable. The decision of the Court of Appeals affirming the district court's summary judgment is correct and does not conflict with any decision of this Court. Accordingly, further review by this Court is not warranted.

Brief for Respondents in Opposition ("Respondents' Brief"), at 17; *accord id.* at 2 (the Eighth Circuit's opinion "makes no new law" and "succinctly states and follows well established principles firmly established in decisions of this Court and in no way conflicts with the decisions of any other circuit").

Respondents' counsel has been more candid with the public, however, than he has been with this Court. On November 13, 1989, one week after the date of plaintiff's Petition for a Writ of Certiorari, counsel for respondents-defendants published an article in "The Nation" magazine, analyzing the decision of the Eighth Circuit in this case.

See Garbus, *The FBI Man Who Cried Libel*, The Nation, Nov. 13, 1989, at 564 (full text of the article is appended to this Reply Brief). In direct contradiction to the arguments counsel for respondents was preparing to make in his brief to this Court, the article presents the following analysis of whether the Eighth Circuit's decision is important and consistent with this Court's rulings:

> We can hope the Federal Court of Appeals landmark decision and the values it expresses will be followed by other courts rather than the different messages coming from the Supreme Court. The *Price* case could become a standard for courts to follow as an alternative to the kind of decisions the Supreme Court will probably hand down in the 1990s.

Reply App., at RA-6-7. This article by defendants' own counsel further describes the "landmark" Eighth Circuit ruling as one that "resurrected and then expanded a controversial concept: the doctrine of neutral reportage privilege, first articulated by Federal Judge Irving Kaufman in 1977." *Id.* at RA-5. The article further acknowledges that the Eighth Circuit's decision "resolved an extraordinary conflict in libel law," and that plaintiff in this case "relied on previously accepted law" which "had been accepted by the lower courts" but which was rejected by the Eighth Circuit when it dismissed plaintiff's libel action as a matter of law, prior to trial. *Id.* at RA-4.

Thus, as defendants' own counsel candidly admits, there can be little doubt as to the certworthiness of the legal issues raised by plaintiff's petition. The question is whether there is anything peculiar about the facts that makes this case an inappropriate one for addressing those important legal issues.

II.

THE FACTUAL CLAIMS MADE BY RESPONDENTS CANNOT BE RESOLVED ON SUMMARY JUDGMENT AND NEED NOT BE ADDRESSED OR RESOLVED BY THIS COURT.

Respondents in their brief devote most of their discussion to their view of the "facts" in this case, implying that the author did nothing more than republish what is already in the public record. As discussed below, respondents have substantially misstated and overstated the public record, and have mischaracterized the defamatory allegations at issue. It is important to re-emphasize at this point, however, that this case is on appeal from the granting of summary judgment.

Defendants rely heavily on *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678 (1989) as support for the judicial factfinding done by the Eighth Circuit in this case. *Harte-Hanks* does not support defendants. *Harte-Hanks* was not a summary judgment case. Rather, it addressed the question of appropriate appellate review of jury findings in media libel cases. This Court held that jury findings based on credibility and demeanor of witnesses are not to be disturbed on appeal, but that the appellate court should examine the defamatory statements and surrounding circumstances to be sure first amendment interests are protected. *Id.* at 2696 & n. 35.

Harte-Hanks has little or no relevance to summary judgment appeals, where there is as yet no trial or jury findings to review. On summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), continues to govern the scope of review, and all disputed evidence must be construed favorably to the non-moving party. Moreover, even by analogy, *Harte-Hanks* does not support defendants' position. Neither *Harte-Hanks* nor *Liberty Lobby*

authorize the courts to construe the evidence most favorably to the media defendants and reject the non-moving plaintiff's sworn version of the facts. That is what the Eighth Circuit did. It is also what defendants do in their Respondents' Brief, which reads like a closing argument and makes no attempt to construe the facts in the light most favorable to plaintiff.

For example, both the Respondents' Brief and the Eighth Circuit opinion emphasize that certain of the allegations about plaintiff have appeared previously in other books predating *Crazy Horse*. They fail to mention, however, that defendants themselves admitted these publications were "lurid" propaganda tracts, untrustworthy and with limited circulation. Matthiessen Depo., at 156-57, C. R. Item No. LIII; Elizabeth Sifton Depo., at 272, C. R. Item No. LII. Both defendants and the Eighth Circuit also wholly ignored the author's remarkable direct admission, in his deposition, of reckless disregard for the truth.[1] Matthiessen Depo., at 158-59, C. R. Item No. LIII. They also ignored the evidence that the author had a sub rosa deal with Leonard Peltier, never disclosed to the readers, to share royalties in exchange for an "exclusive." O'Keefe Aff., Exs. A & B, C. R. at 105-19. They ignored the fact that the author studiously avoided interviewing Louis Moves Camp, Myrtle Poor Bear, Ronald Riggs, and other key participants who could have confirmed or denied the defamatory allegations, despite having ready access to those persons during his several trips to the Pine Ridge Indian Reservation. Matthies-

[1] This admission was confirmed by defendants' counsel in the recent "The Nation" article: "But Matthiessen argued that some of the accusations he reported were true and that, in any event, *even when he doubted the truth of the accusation*, the reporting of the accusation was necessary because it showed the Indians' view of events." Reply App., at RA-4 (emphasis supplied). Thus defendants concede they published defamatory allegations while entertaining serious doubts as to the truth of those allegations.

sen Depo., at 392-94, 547, 591. *See Harte-Hanks*, 109 S. Ct. at 2698-99 ("evidence of intent to avoid the truth" by not interviewing important witness establishes *New York Times* malice).

In response to defendants' summary judgment motion, plaintiff in fact presented thousands of pages of testimony and exhibits demonstrating systematic invention and distortion of "facts" by the author in *Crazy Horse*. *See, e.g.*, Price Aff., C. R. Item No. LVI; Second Price Aff., C. R. Item No. XXXVII; First Guthmann Aff., C. R. Item No. XXXIV. Literally every recognized category of malice evidence was presented by plaintiff in properly sworn form. *See* Bloom, *Proof of Fault in Media Defamation Litigation*, 38 Vand. L. Rev. 247 (1985). This evidence revealed a publication, masquerading as factual investigative journalism, that in fact was a careful and studied effort to falsify events, and in the process specifically defame plaintiff, in order to convince an unsuspecting readership that Leonard Peltier (the author's silent partner in the publishing enterprise) had been framed for the murder of two FBI agents as part of a broader government conspiracy against the American Indian Movement.[2] The Eighth Circuit erroneously believed it was empowered on summary judgment to ignore plaintiff's version of the sworn evidence and accept defendants' version, which is exactly what it did by, for example, ignoring the author's direct admission of *New York Times* malice. The Court of Appeals in fact left no question as to what it was doing, stating that "we make an independent judicial evaluation of the record" which does "not analyz[e] evidence in light favorable to the nonmover." App., at A-14. This Court should correct that

[2]Contrary to defendants' assertions, this case is not an attempt by the FBI to stifle public criticism and commentary on government policies concerning the American Indian Movement. This is a suit by an in-

error by announcing the correct legal standards for opinion and neutral reportage, and remand for reconsideration in light of those standards and the correct standard for summary judgment review on malice. The Court need not and should not itself resolve the factual issues raised by the voluminous summary judgment submissions made in this case.

III.

THE DEFAMATORY ALLEGATIONS AT ISSUE IN THIS CASE ARE NOT DERIVED SOLELY FROM THE PUBLIC RECORD.

A cursory reading of Respondents' Brief, and even to some extent the Eighth Circuit's opinion, might suggest that all Matthiessen did in *Crazy Horse* was accurately republish information about plaintiff obtained from court records and other public documents. This suggestion is inaccurate, as a closer reading of respondents' brief confirms: they admit, for example, that the author's sources included "learned judges, lawyers *and participants in the events* . . ." Respondents' Brief, at 4 (emphasis supplied). Even more candidly, "The Nation" article confirms that: "These accusations were drawn from a variety of sources, including

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dividual for defamation of his personal reputation. Authors are free to distort "history" and to comment unfairly on public events, as Matthiessen did in *Crazy Horse*. They do not, however, have a license to falsely and recklessly accuse a living person of criminal conduct in the process. That is the holding of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In this regard, brief comment on another aspect of "The Nation" article is in order. Defendants' counsel refers in that article to "rumors" that this action is being financed by the FBI — that it in actuality is a seditious libel action. Reply App., at RA-3. By the end of the article these "rumors" (which to plaintiff's knowledge have been propagated solely by defendants themselves) have become fact: this case is described as one brought by plaintiff and the FBI "to silence their critics with costly libel suits financed by government resources." Reply App., at RA-7. Of course, there is no truth to these allegations, as defendants themselves well know. *E.g.*, Second Price Aff., C. R. Item No. XXXVII. Indeed the article is an excellent example of how defendants went about condemning Mr. Price in *Crazy Horse* itself, by turning false and unsubstantiated defamatory rumors into purported facts.

AIM members . . . whom Price described as 'criminals and their supporters': leftists, AIM members and their sympathizers." Reply App., at RA-2, 5.

This characterization of the author's sources is fully supported by the record. It is true, and plaintiff has never denied, that there are statements by judges and lawyers in court records concerning some limited aspects of this case. Judge Nichol did criticize the FBI, and arguably plaintiff implicitly, concerning the Louis Moves Camp "rape" incident, based on a misunderstanding of plaintiff's actual role in those events. Appellate Judges Ross and Wollman, and federal prosecutor Hultman, stated on the record their view that Myrtle Poor Bear was "incompetent," though none of them had ever met or observed Ms. Poor Bear as plaintiff had.[3]

The fact is, however, that there is nothing in the public record to support the large majority of defamatory allegations about plaintiff. For example, the allegation that plaintiff knowingly suborned and was responsible for the alleged perjurious testimony of Louis Moves Camp is the author's own conclusion and is not merely a republication of the public record. Similarly, the many false allegations about plaintiff concerning the Anna Mae Aquash murder are not from the public record. The corruption and violation of civil rights charges also are not derived from the public

[3]Respondents' Brief seriously mischaracterizes the public record beyond these limited instances. For example, at page 13 of their brief, respondents assert that various governmental inquiries have "questioned" plaintiff's role in investigating the Aquash murder. The sources cited (Exhibits 132, 133, and 134) are in fact a letter by an AIM lawyer, a report of the U.S. Commission on Civil Rights that makes no reference directly or indirectly to plaintiff, and FBI and Justice Department reports that also make no reference to plaintiff and, furthermore, explain why the FBI acted properly in investigating the Aquash murder. Indeed, most of the public record "sources" cited by defendants in their brief do not even relate to plaintiff personally or do not accuse plaintiff of any wrongdoing.

record. Thus, pre-trial dismissal of this case cannot be justified on the theory that the author simply republished what appears on the public record.[4]

IV.

THE DEFAMATORY ALLEGATIONS AT ISSUE ACCUSE PLAINTIFF OF SPECIFIC CRIMINAL WRONGDOING, AND ARE NOT SIMPLY EXPRESSIONS OF OPINION.

Respondents' Brief argues that the allegations at issue are nothing more than "opinions" by the author, and that the Eighth Circuit simply applied established opinion principles in affirming summary judgment. Again, defendants' counsel in "The Nation" article more candidly concedes the contrary. It has always been plaintiff's position in this case that a reasonable person, after reading *Crazy Horse* as a whole, would conclude that the author was accusing plaintiff of specific criminal wrongdoing, and that this "gist" or "sting" of the book when read as a whole is what matters in deciding if the allegations constitute defamatory fact or protected opinion. *See* W. Prosser, The Law of Torts § 111, at 781-82 (5th ed. 1984). In "The Nation" article, defendants' counsel again concedes plaintiff's point, describing *Crazy Horse* as follows:

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[4]Even if it were true that all the defamatory allegations at issue were derived from public record sources, that would not be the end of the analysis. Such evidence, for example, would not be conclusive as to *New York Times* malice. Malice relates to the author's subjective state of mind: did he entertain serious doubts as to the truth of what he wrote? *See St. Amant v. Thompson*, 390 U.S. 727 (1968). Here, the author admits he did. Nor would reliance on public sources be sufficient, standing alone, to establish the neutral reportage defense. Assuming that defense is recognized, it requires "neutral" reporting, and does not protect an author who like Matthiessen here, personally espoused those allegations. Consequently, even if it were true (which it is not) that the author relied solely on public record sources this nonetheless would be an appropriate case for addressing the legal issues raised by this appeal, leaving resolution of factual issues to the Jury and the lower courts.

> Price said that Matthiessen defamed him by charging that he and other FBI agents engaged in illegal conduct. The book contains allegations that agents [in the book, Price specifically and by name] induced witnesses to commit perjury and obstructed justice in the Peltier case and others, that they were racists and killers, and that they were "corrupt and vicious" in their treatment of the Indians on the reservation.

Reply App., at RA-2. Thus, there is no doubt that *Crazy Horse* was intended to, and did, convey that plaintiff engaged in specific criminal wrongdoing, which under any rational opinion standard must be deemed statements of fact, not opinion.

Defendants also are wrong in asserting that the Eighth Circuit applied standard opinion doctrine, or, for that matter, that a standard opinion doctrine even exists. The Eighth Circuit held that even verifiably false criminal allegations can be protected opinion, and that allegations of criminal wrongdoing are opinion if accompanied by modifiers such as "all but inescapable." Pet. App. A, at A-23-24. It is indisputable that these holdings go well beyond those of the other courts of appeals, even courts that have recognized a broad opinion defense. Those other courts of appeals hold uniformly that allegations of specific criminal wrongdoing cannot be protected as opinion by inclusion of qualifiers such as "alleged," "could have," or "might have." *E.g.*, *Ollman v. Evans*, 750 F.2d 970, 983, 985 n. 31 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980). A conflict clearly exists in the circuits on this issue, requiring resolution by the Supreme Court.

V.

CONCLUSION

This case raises important and unresolved first amendment media libel issues, as counsel for respondents has candidly conceded. There is nothing unique about the record in this case that makes the questions presented peculiarly fact-bound. Any major, complex media libel action will have facts pro and con. The questions presented to this Court do not require the Court to address or resolve the parties' disputed versions of the facts. This is not an appeal from a jury verdict. Dismissal occurred here as a matter of law, on summary judgment, based principally on admittedly "controversial" applications of the opinion and neutral reportage defenses. The issues raised in the petition are legal, not factual, and the Court cannot realistically expect a different case to raise these important and unresolved first amendment legal issues in a more appropriately reviewable posture than does the present case.

Dated: December 12, 1989.

Respectfully submitted,

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REPLY APPENDIX

Reprinted from *THE NATION*, volume 249, number 16, pages 564-567 (November 13, 1989):

• *Freedom To Write History*

THE F.B.I. MAN WHO CRIED LIBEL
Martin Garbus

In August the United States Court of Appeals for the Eighth Circuit dismissed F.B.I. agent David Price's $25 million libel suit against Peter Matthiessen and Viking Press, the author and publisher respectively of *In the Spirit of Crazy Horse* [see Peter Matthiessen, "Travels Through Indian America," February 12, 1983]. The decision was a strong reaffirmation of the right of authors and journalists to criticize government officials. It also comes at a time when the Supreme Court has handed down several decisions that severely impair freedom of the press, specifically by placing restrictions on the landmark libel decision *New York Times v. Sullivan*.

The 1964 *Sullivan* decision dramatically changed libel law by setting the requirement that government officials and other public figures who sue for libel must show that the material in question was published with "actual malice" — with full knowledge of the falsity of the charges and with "reckless disregard" for the truth. Chief Justice William Rehnquist and several of his conservative colleagues on the Court have long expressed dissatisfaction with the *Sullivan* case because it subjects state libel laws to national stand-

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Martin Garbus, author of Traitors and Heroes *(Atheneum) and a New York trial attorney, defended Peter Matthiessen and Viking Press in the libel suits filed by David Price and William Janklow.*

ards. The majority is not expected to overrule *Sullivan* but rather to undermine it. As in their most recent decision on abortion, they will accomplish this by giving the states greater power to define constitutional rights more narrowly. But the *Price* decision upheld the Federal standard and indeed expanded it by clarifying the right of authors and journalists to quote sources on both sides of a dispute, however "hostile" or "disreputable" the sources may be.

The *Price* decision, written by Judge Gerald Heaney, ended one of the longest and most bitterly fought libel suits in U.S. history. Price filed his complaint in 1983, shortly after Viking published Matthiessen's book, which focused on the events leading up to the shootout between Federal agents and members of the American Indian Movement (AIM) occupying the Pine Ridge Reservation in South Dakota. Two F.B.I. agents were killed, and Leonard Peltier, a member of AIM, was later convicted of murder. David Price was one of the agents involved in the shootout.

Price said that Matthiessen defamed him by charging that he and other F.B.I. agents engaged in illegal conduct. The book contains allegations that agents induced witnesses to commit perjury and obstructed justice in the Peltier case and others, that they were racists and killers, and that they were "corrupt and vicious" in their treatment of the Indians on the reservation. These accusations were drawn from a variety of sources, including AIM members. Matthiessen concluded that Peltier's conviction may have been a miscarriage of justice because of F.B.I. misconduct and that the Bureau's actions were part of a larger conspiracy to crush the Indian movement.

Price tried to impugn Matthiessen's sources by pointing out that some of them were AIM members who had been

convicted of criminal acts for the occupation of Wounded Knee. Price called their supporters and lawyers "gangsters, hoodlums and liars."

Price's suit demonstrated what many legal experts have long contended: that libel actions can be a powerful form of censorship, in this instance by government officials who were criticized for misconduct. It was filed with the approval and support of the F.B.I., and there were rumors, never confirmed, that the Bureau set up a fund to pay for all or part of Price's legal expenses. After the suit was filed a planned paperback edition of *In the Spirit of Crazy Horse* was canceled.

The trial cost Matthiessen and Viking more than $1 million. In addition, Matthiessen, his editor and his publisher spent a miserable six years in a lawsuit that Judge Heaney himself characterized as "acrimonious." There were six different decisions by three different courts in two states before the case reached the Federal Court of Appeals. And Matthiessen is still fighting a separate suit filed by the former Governor of South Dakota, William Janklow, who charges the book libels him by calling him a racist and a bigot.

Price and the F.B.I. filed suit in Federal court in South Dakota on the theory that the jury would be dominated by white ranchers in a state where there is considerable anti-Indian sentiment and would thus render a devastating multimillion-dollar verdict against a New York author and publisher. The defendants, however, objected that they couldn't get a fair trial before such jurors and the trial was transferred to Minneapolis, perhaps the best city in the United States in which to defend such a case. Jurors there are knowledgeable about Indian affairs and, over the years, have shown sympathy for press concerns, as have many of

the judges. Judges in Minneapolis have been more skeptical of government claims than those in South Dakota.

In 1987 a Federal district judge dismissed the suits, and Price appealed. In his decision Judge Heaney, writing for a three-judge panel, gave a ringing affirmation of *New York Times v. Sullivan:*

> The motivating factor in the Court's analysis was protection for criticism of public officials and speech regarding issues of political concern. The *New York Times* standard was constructed in light of three truths about public speech. First, false statements would necessarily occur in the course of a vigorous public debate. Second, absent protection for even false statements, destructive self-censorship would result. *Third, the legal standards for defamation must protect defendants from the self-censorship imposed by threats of litigation.* The Court felt that debate on matters of public concern "should be uninhibited, robust, and wide-open . . . [though] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [Emphasis added.]

The Federal Court of Appeals resolved an extraordinary conflict in libel law: whether or not it is libelous to repeat the charges and countercharges made during a political controversy. Price relied on the previously accepted law that repeating a false accusation against a government official could be libelous. But Matthiessen argued that some of the accusations he reported were true and that, in any event, even when he doubted the truth of the accusation, the reporting of that accusation was necessary because it showed the Indians' view of events. He said a writer discussing gov-

ernment officials must be free to present the views of government critics.

Price and the F.B.I. sought to make a distinction between so-called responsible critics — for example, a member of Congress, the *New York Times* editorial page or court records, all of which Matthiessen quoted — and sources whom Price described as "criminals and their supporters": leftists, AIM members and their sympathizers. This distinction between "good" and "bad" sources had been accepted by the lower courts. The question of whom writers may quote without fear of libel pervades all writing about controversial matters involving living people. Unless authors can quote both sides and rely on all sources they cannot contribute to the historical record.

In resolving this issue, Judge Heaney resurrected and then expanded a controversial concept: the doctrine of neutral reportage privilege, first articulated by Federal Judge Irving Kaufman in 1977. Kaufman held that authors may present accusations made by participants in a controversy even if the authors know them to be false. But Kaufman also said that while authors may safely report the accusations of a public official, they are on more dangerous ground when they rely on the words of an ordinary citizen.

Judge Heaney and his colleagues agreed that even if a government official could be injured by such false reports, to suppress them would unduly inhibit the debate. They also recognized the importance of a national standard, rather than a different set of rules for each state. For if a book or newspaper or television show could be suppressed in a particular state by the threat of a libel suit, the national media would avoid controversial subjects. Judge Heaney wrote:

> Sometimes it is difficult to write about controversial events without getting into some controversy along the way. In this setting, we have decided that the Constitution requires more speech rather than less. Our decision is an anomaly in a time when tort analysis increasingly focuses on whether there was an injury, for in deciding this case we have searched diligently for fault and ignored certain injury. But there is a larger injury to be considered, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated.
>
> In its entirety, *Crazy Horse* focuses more on public institutions and social forces than it does on any public official. The sentiments it expresses are debatable. We favor letting the debate continue.

Contrast Heaney's decision with the Supreme Court's anti-press rulings in three separate cases this past June: First, it refused to prohibit punitive damage awards in libel cases. Second, it refused to set aside a $2 million award against the *Pittsburgh Post-Gazette*, the largest damage award actually imposed on a newspaper in U.S. history. In the third case, perhaps the most dangerous, the Court upheld a jury verdict against an Ohio newspaper because its story about a political candidate did not include information that would have made the story more balanced. In a number of previous cases the Court had refused to impose liability on a newspaper for material that it did not print; the Court would find libel only in what was printed. The Ohio case erodes that precedent.

We can hope the Federal Court of Appeals landmark decision and the values it expresses will be followed by

other courts rather than the different messages coming from the Supreme Court. The *Price* case could become a standard for courts to follow as an alternative to the kind of decisions the Supreme Court will probably hand down in the 1990s. Had the *Price* case gone the other way the results would have been calamitous; reporters would have been reluctant to rely on sources that judges and juries might find disreputable and officials would have been encouraged to silence their critics with costly libel suits financed by government resources.

Our Founding Fathers' vision of a free and vigorous press could be damaged severely if the Supreme Court reverses the *Price* case. Although a successful appeal is unlikely, the Court, in other press cases before it, will bring further bad news to the media.

I still find the *Sullivan* case most persuasive; it appropriately balances the scales between a free press and responsible reporting. Justice Hugo Black, in his opinion in that case, wrote, "I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials." His doubt does not appear to be uppermost in the minds of the majority of the American people, today's journalists or Supreme Court Justices.